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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 02 023 51871 Office: NEBRASKA SERVICE CENTER Date: MAR 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant
> which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $82,850.00 per annum.

Counsel submitted copies of the petitioner's bank statements for December 1997 through January 1998; February 1998; and April through July of 2001, a copy of the petitioner's unaudited financial statement for the period ended July 31, 2001, copies of the petitioner's Form 941 Employer Quarterly Federal Tax Return for the quarters ended March 30, 1999; June 30, 1999; March 31, 2000; June 30, 2000; and the four quarters of 2001, copies of the petitioner's Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Return for 1999 and 2000, and copies of the petitioner's 1999, 2000, and 2001 Form 1120S U.S. Income Tax Return for an S Corporation.

The tax return for 1999 reflected gross receipts of $841,315; gross profit of $642,507; compensation of officers of $0; salaries and wages paid of $244,029; and an ordinary income (loss) from trade or business activities of $15,533. The tax return for 2000 reflected gross receipts of $853,700; gross profit of $632,670; compensation of officers of $0; salaries and wages paid of $223,603; and an ordinary income (loss) from trade or business activities of $12,298.

The tax return for 2001 reflected gross receipts of $831,677; gross profit of $628,686; compensation of officers of $15,086; salaries and wages paid of $217,612; and an ordinary income (loss) from trade or business activities of $53,907.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation and argues, "[t]axable profit is not the right way to determine the petitioner's ability to pay because it includes many accounting entries such as Depreciation, Amortization etc."

In determining the petitioner's ability to pay the proffered wage, CIS, formerly INS, will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Additionally, even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's Form 1120S for calendar year 1998 shows a taxable income of -$5,887. The petitioner could not pay a proffered wage of $82,850.00 a year out of this income.

In addition, the tax returns for 2000 and 2001 continue to show an inability to pay the wage offered.

It is noted that the petitioner is a successor-in-interest to King Drive Donuts, Inc. There is no evidence in the file, however, which establishes that King Drive Donuts, Inc. could pay the proffered wage in 1998, the year the current petitioner became a successor-in-interest and the year of the filing of the labor certification.

Accordingly, after a review of the federal tax returns submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of filing of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.